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Nos. 95-1455 & 95-1508

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,
Appellant, and

GEORGE PRICE, *et al.*,
Appellants,

v.

BOSSIER PARISH SCHOOL BOARD,
Appellee.

**On Appeal from the
United States District Court
for the District of Columbia**

REPLY BRIEF OF APPELLANTS GEORGE PRICE, ET AL.

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INTRODUCTION

In its brief to this Court, the Bossier Parish School Board now concedes that: (1) *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 426 U.S. 252 (1977), sets the legal standard for determining whether the Board adopted the Police Jury plan in part for a discriminatory purpose, B.P. Br. 29, 33, 36, 49;[1] (2) if the plan was adopted in part for a

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[1] In this brief, record citations conform to the abbreviations set forth in the Brief of Appellants George Price, *et al.*, at 1 n.1 (filed

discriminatory purpose, it violates Section 5 even though it may be nonretrogressive, *id.* at 10; and (3) in determining whether the plan was adopted in part for a discriminatory purpose, it would be "indefensible" for a court to ignore relevant evidence merely because that evidence would also be relevant to a Section 2 claim, *id.* at 31. Even though Bossier thereby acknowledges that appellants are right on the law with respect to the standards governing the "purpose" prong of Section 5, it does not and cannot show that it meets those standards. Instead, in its effort to defend the lower court's judgment, Bossier mischaracterizes the central issues before this Court, misstates the ruling of the majority below, and misrepresents the stipulated and unrebutted facts in the record.

For example, Bossier repeatedly mischaracterizes this case as one raising the question whether a governmental body unlawfully discriminates solely because it fails to *maximize* the number of majority-minority election districts. *See, e.g.*, B.P. Br. 6. In fact, the question is whether the Board adopted its plan in part to *minimize* the number of majority-minority districts and keep it at zero.

Likewise, this case does not ask this Court to choose between Bossier's plan and what it calls an "objectively inferior" maximizing alternative. *Id.* Instead, this case concerns the Board's refusal to consider *any* possible plan with even a single majority-minority district and its sudden adoption of a previously rejected and seriously flawed minimizing plan only when it was publicly confronted with the fact that majority-minority districts were a viable option.

August 1, 1996). Additional abbreviations are as follows: Brief of Appellee Bossier Parish ("B.P. Br."); Brief of Appellants George Price, *et al.* ("D-I Br."); and Jurisdictional Statement of Appellants George Price, *et al.* ("D-I J.S.").

In the end, the central question in this case is whether the Board met its burden to prove that its hasty reversal about the Police Jury plan was not motivated even in part by a discriminatory purpose. Applying the *Arlington Heights* standard—which all parties now acknowledge as controlling—to the stipulated and unrebutted facts, Section 5 preclearance should be denied because this "evidence demonstrates conclusively that the Bossier School Board acted with discriminatory purpose." App. 39a (Kessler, J., dissenting). Therefore, this Court should correct the majority's legal errors and reverse the decision below.

ARGUMENT

I. THE PURPOSE PRONG OF SECTION 5 IS DETERMINATIVE IN THIS CASE

Notwithstanding that Bossier spends the bulk of its brief arguing that a Section 2 violation should not be grounds for denying Section 5 preclearance, B.P. Br. 8-27, this Court need not reach that issue. This case has always been primarily a Section 5 discriminatory purpose case. The analysis of discriminatory purpose under *Arlington Heights* was the primary focus of all the briefing below. Indeed, the purpose evidence was so overwhelming that it was the *only* issue addressed in the Defendant-Intervenors' Post-Trial Brief.

All the parties agreed below, moreover, both that the court need not address Section 2 if Bossier "failed to meet its burden of proof on the issue of purpose" and, on the other hand, that it would make no sense to preclear a redistricting plan that violates Section 2. App. 144a (Stip. 257). We continue to support this position. *See* D-I Br. 43-45.

This Court, however, need not reach the Section 2 incorporation issue because the majority below failed to apply the proper legal standard to the evidence that

"demonstrates overwhelmingly" the Board's discriminatory purpose. App. 63a (Kessler, J., dissenting). Thus, if the Court agrees with us on the Section 5 purpose issue, the subsidiary Section 2 issue need not be decided. On the other hand, even if the Court decided the Section 2 incorporation issue against us, the discriminatory purpose issue would still have to be reached.

Furthermore, and contrary to Bossier's repeated contentions, addressing the purpose issue under *Arlington Heights* will not require this Court "indirectly" to decide the incorporation issue. B.P. Br. 6-7, 30-31. The overwhelming evidence of discriminatory purpose in this case does not hinge on the presence of a Section 2 violation or the Board's "failure to maximize." *Id.* at 7.

Instead, the evidence here—including direct admissions of discriminatory purpose, a discriminatory impact on minority voters, an ongoing history of discrimination, a failure to comply with stated redistricting criteria, and plainly pretextual *post hoc* rationalizations—unequivocally reveals that the Board adopted a previously rejected minimizing plan in direct response to the public debunking of its earlier claim that a majority-black district was impossible. Since Bossier adopted its plan in part for a discriminatory purpose, it should be denied preclearance, and the Board should be directed to develop a new plan free of such influences.

II. BOSSIER HAS CONCEDED THE LEGAL STANDARDS THAT GOVERN THE SECTION 5 PURPOSE PRONG

In its motion to dismiss this appeal, Bossier admitted that the majority below failed to apply *Arlington Heights* to the stipulated and unrebutted facts; Bossier argued then that a different legal standard should apply. Motion to Dismiss or Affirm at 11-12. Now, Bossier agrees that *Arlington Heights* applies. B.P. Br. 29, 33, 36, 49.

Indeed, our Jurisdictional Statement raised four questions regarding the legal standards applicable to the purpose prong of Section 5, D-I J.S. i., and Bossier now appears to agree with our position on all four. First, Bossier now *expressly* "agree[s] that courts - in Section 5 proceedings . . . should not exclude evidence probative of the legal question being resolved simply because it is also relevant to another legal issue." B.P. Br. 28. In fact, Bossier concedes that it is an "indefensible ruling that otherwise material evidence of purpose somehow should be excluded because it was also relevant to Section 2." *Id.* at 31. Second, Bossier acknowledges that this Court's decisions "in just the past two Terms" have confirmed that Section 5 preclearance must be denied even to an ameliorative plan, and certainly to a minimizing plan, if it is adopted with "an invidious purpose." *Id.* at 10 (citing *Miller v. Johnson,* 115 S. Ct. 2475 (1995)). Third, Bossier agrees that it bears the burden of proof under Section 5, *id.* at 8-9, implicitly acknowledging that the court itself should not provide its own arguments to meet that burden. Finally, in accepting *Arlington Heights* as the governing legal standard, Bossier also apparently acknowledges that if a discriminatory purpose was "a motivating factor" in its decision, preclearance should be denied. *Id.* at 29, 33, 36, 49; *Arlington Heights*, 465 U.S. at 265-66.

III. THE MAJORITY BELOW PLAINLY DID NOT APPLY THE GOVERNING STANDARDS

At the outset, we urge the Court to consider that in its motion to dismiss the Board *agreed* that the majority both refused to apply *Arlington Heights* and excluded from consideration all evidence relevant to Section 2. Motion to Dismiss or Affirm at i, 11-12. Now, however, Bossier has reversed course completely and contends that the majority *did* apply *Arlington Heights* and *did* consider certain Section 2 evidence, excluding only Section 2 evidence that would not be relevant to discriminatory purpose under Section 5. B.P. Br. 8, 27-39. A

party is not permitted to contradict itself in this fashion and raise for the first time in its responsive brief on the merits an argument it could have made in opposition to certiorari or in a motion to dismiss. *See Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2897 n.9 (1992); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815-16 (1985). Accordingly, the Court should not consider Bossier's new argument.

In any case, the argument is plainly without merit. To sustain its new view that the majority correctly applied *Arlington Heights* and considered all the relevant evidence, Bossier ignores both what the majority says it did as well as what it actually did. Relying now on a solitary footnote, Bossier claims that the majority's failure to apply *Arlington Heights* and its exclusion of "Section 2 evidence" were harmless, because it excluded from consideration solely that "evidence relevant *only* to the section 2 inquiry." B.P. Br. 27 (quoting App. 9a n.6) (emphasis added). Bossier, however, can cite no evidence introduced by appellants that is irrelevant to discriminatory purpose under *Arlington Heights*. Therefore, this footnote cannot save the majority's decision.

The text of the majority's opinion also makes clear that the majority considered any evidence that was relevant to Section 2 to be irrelevant to Section 5. In each of the three references in the text of the majority's opinion to its refusal to consider "section 2 evidence," the majority does not limit its discussion to evidence relevant "only" to Section 2. *See* D-I Br. 29 n.6 (quoting App. 23a-24a). Rather, the majority plainly and repeatedly explains that this evidence's relevance to Section 2 is *the reason* that it should not be considered in a Section 5 proceeding. App. 23a-24a. That is why the footnote relied on by Bossier must be read to mean that such evidence would not be considered under Section 5 because, in the majority's view, by definition it was "relevant only to the section 2 inquiry." *Id.* at 9a n.6. Moreover, when

Judge Kessler in dissent pointed out both the proper legal standard and the majority's refusal to apply it, App. 39a n.2, 42a n.4, the majority did not profess that it really was weighing *all* the evidence.

This reading of the majority's opinion is confirmed by what the majority actually did in excluding certain relevant evidence. It is also confirmed by Bossier's own laborious effort to demonstrate that the impact on minority voters of the Board's plan and Bossier's ongoing history of discrimination are insignificant in this case. B.P. Br. 3-5, 27-39. The majority's opinion, of course, says none of this, because the majority never considered such evidence.

For example, without citation to the majority's actual opinion, Bossier claims that "[t]he court assumed" that its plan negatively affected black voters' electoral opportunities but found that the Board adopted the plan "in spite of" that impact. *Id.* at 33. The majority did not say this and made no such assumption; not a sentence of the majority's opinion addresses the discriminatory impact of the Board's plan.

Bossier also suggests that the majority considered the Board's ongoing history of discrimination, but concluded that it was not particularly probative. B.P. Br. 36-38. Bossier again rests its claim principally on a single footnote taken out of context. *Id.* at 37 (citing App. 34a n.18). Even in this footnote, however, the majority stated that it did not "see how [Bossier's continuing willful failure to comply with school desegregation orders] can be in any way related to the School Board's purpose in adopting the Police Jury plan." App. 34a n.18. In contrast, Bossier itself now concedes that "'a series of official actions taken for invidious purposes'" is relevant to the question "whether this specific voting change was motivated by the same invidious purposes." B.P. Br. 36 (quoting *Arlington Heights*, 429 U.S. at 267). Moreover, the rest of the voluminous evidence of

discrimination in Bossier Parish and by the Board itself is never even mentioned by the majority. App. 42a n.4. (Kessler, J., dissenting).

In sum, it is implausible to conclude, as Bossier urges, that the majority silently applied *Arlington Heights* and actually considered the crucial "Section 2" evidence that it said it did not. Accordingly, the majority's resulting judgment is erroneous as a matter of law and should be set aside.

IV. BECAUSE UNDER THE GOVERNING STANDARDS THE RECORD LEAVES NO DOUBT THAT DISCRIMINATORY PURPOSE MOTIVATED THE BOARD'S ACTION, THIS COURT SHOULD REVERSE

Bossier's contention that this appeal is actually a "straightforward 'clearly erroneous' case," B.P. Br. 28, 39, is itself erroneous. The principal facts relevant to determining discriminatory purpose are not in dispute; they are stipulated and unrebutted. App. 66a-153a (Stip. 1-285); D-I Br. 5-23. The actual dispute here centers on the majority's legal errors in analyzing, and refusing to consider, the stipulated facts. Moreover, when analyzed under the governing legal standards, the actual facts of record permit only one conclusion: "racial purpose fueled the School Board's decision." App. 39a (Kessler, J., dissenting). For that reason, this Court should not merely vacate the majority's opinion; it should reverse and direct that preclearance be denied. *See United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 657 (1964); *Levin v. Mississippi River Fuel Corp.*, 386 U.S. 162, 169-70 (1967).

A. The Board Presented No Evidence of Any Non-Racial Reason to Reverse Itself and Adopt the Police Jury Plan

Throughout its brief, Bossier mischaracterizes the issue in this case as whether the Board had any legiti-

mate reason for rejecting the NAACP plan; the real issue, however, is whether the Board had any discriminatory purpose in adopting the plan it *did* adopt. *See* D-I Br. 38-40.

The Board initially rejected the Police Jury plan on September 5, 1991. App. 47a (Kessler, J., dissenting). As the majority found:

> The School Board did not like the Police Jury plan when it was first presented to them [after it already had been precleared on July 29, 1991, App. 58a], and there were certainly reasons not to. The Police Jury plan wreaked havoc with the incumbencies of four of the School Board members and was not drawn with school locations in mind. [App. 28a.]

The ultimate question, therefore, is why did the Board reverse its decision, and more specifically, did a discriminatory purpose contribute to that reversal?

Bossier asks this Court to assume that the two reasons it adopted the Police Jury plan were those relied on by the majority: "guaranteed preclearance" and "precinct-splitting." B.P. Br. 6 (quoting App. 27a-28a). But Bossier offered no *evidence* that those reasons actually motivated its reversal of position on the plan. Nor is this surprising. Preclearance certainly was no more likely in 1992 than it had been in 1991 when the Board *rejected* the Police Jury plan. And, concerns about precinct-splitting are not a reason *to adopt* the Police Jury plan at all but, at most, a reason—albeit pretextual (*see infra* pp. 18-20)—*to reject* the NAACP plan.

Turning to the actual evidence of record, the Board offered no real explanation for its adoption of the Police Jury plan. The Board's minutes reveal no discussion at all of the merits of the plan or the reasons for adopting it, App. 55a n.11 (Kessler, J., dissenting); U.S. Exh. 7-36, and the majority found that at the Board's public hearing "[n]o one spoke in support of the plan." App.

8a. It also is undisputed that although the Board considered a number of different redistricting options, *id.* at 5a, it did not present a scintilla of evidence about its admittedly closed-door efforts to develop another plan. App. 47a (Kessler, J., dissenting); App. 97a (Stip. 96). Instead, the Board claimed that all of the other alternatives were inadvertently destroyed in a series of computer mishaps. J.A. 165-66.

This case, therefore, is unlike either *Miller*, in which "Georgia's Attorney General provided a detailed explanation for the State's initial decision" to adopt an ameliorative plan, 115 S. Ct. at 2492, or *Shaw v. Hunt*, 116 S. Ct. 1894 (1996) ("*Shaw II*"), in which North Carolina initially adopted an ameliorative plan after rejecting a number of other options for legitimate reasons. *Id.* at 1904. In contrast, Bossier presented *no* evidence of any race-neutral reason why its efforts to develop alternative plans were abruptly abandoned in favor of a previously rejected minimizing plan. Here, the record shows only that the Board resurrected the Police Jury plan in direct response to the public demonstration that it was possible to draw majority-black districts. App. 28a, 6a; App. 46a-50a (Kessler, J., dissenting); D-I Br. 14-21.

Bossier now tries to deflect attention from its unexplained reversal by contending that the issue is whether the Board was required to adopt the NAACP plan. B.P. Br. 40. No one has ever so claimed. App. 60a (Kessler, J., dissenting). Instead, as the majority found, the Board was asked to "consider alternative redistricting *plans*." App. 8a (emphasis added). Black voters specifically asked the Board only to use the NAACP plan "as a foundation" to develop a redistricting plan. App. 101a (Stip. 108). Indeed, George Price initially submitted to the Board only the basic demographic information showing that two majority-black districts could be drawn. App. 6a. The Board itself demanded that Price develop a full plan. *Id.* In the

end, therefore, the Board presented no evidence demonstrating a non-discriminatory explanation for its reversal.

B. Board Members Admitted Bossier's Discriminatory Purpose

On the other hand, several Board members actually admitted that the Board's sudden turnabout with respect to the Police Jury plan resulted from the fact that "school board members oppose [the] idea" of "black representation on the board." J.A. 93; App. 31a. The majority below improperly attempted to explain this evidence away, *see* D-I Br. 36-38, and Bossier now asks this Court to accept those explanations. B.P. Br. 50 n.35. The Court should not do so.

The Board member who made the admission quoted above, Henry Burns, did not testify, and as the majority noted, the Board did not "cross-examine . . . on this point." App. 31a. Thus, the statement stands undisputed. Another Board member, Barry Musgrove, also admitted that "other Board members were hostile to drawing majority-black districts." *Id.* at 32a. Mr. Musgrove did testify, and he did not deny "making this statement," as the majority suggests, *id.*, but said only that he did not "recall" it. Tr. I at 56. Finally, Board member Thomas Myrick, whose denial of his involvement in the Police Jury redistricting process the majority rejected as false, *see* D-I J.S. 28 n.9; D-I Br. 11-12 n.3, told the Board's redistricting consultant that he wanted to avoid the creation of a majority-black district, J.A. 163-64, and told black voters that he would not "let [them] take his seat." App. 6a n.4.

Because these statements are direct evidence of the Board's intent, and because Bossier cannot refute them, it attempts instead to avoid them. Although it made no objection below, Bossier now implies that all of these statements are hearsay, B.P. Br. 50 n.35, but, as admissions of a party, they are not. Bossier also now

claims that the statements were only "allegedly" made, *id.*, but it presented no evidence below to raise doubt that they were said. Finally, Bossier claims that these statements are not probative of discriminatory purpose without "the most nefarious possible spin," *id.*, but this clearly is not so. We ask only that the Court accept these statements at face value and view them in the context of the stipulated facts ignored by the majority below.

C. The Board's Otherwise Unexplained Retreat to the Police Jury Plan Dilutes Minority Voting Strength

The majority below erred in refusing to consider the undisputed evidence that the effect of maintaining twelve-of-twelve majority-white districts would be to dilute the ability of minority voters to elect candidates of their choice. D-I Br. 29-33. Bossier now attempts to defend this refusal by falsely contending that the Police Jury plan "enhanced minority voting strength," B.P. Br. 40, and that Bossier Parish is not characterized by racially polarized voting, *id.* at 3-5. However, the record unequivocally shows that: (1) when compared to the Board's 1980s plan the Police Jury plan actually reduces the minority voting-age percentage in the three districts with the highest minority concentrations, *compare* J.A. 47 *with* J.A. 44; and (2) voting in Bossier Parish plainly is racially polarized.

First, no black candidate had ever been elected to the Board. App. 67a (Stip. 4). Second, in the four Board elections since 1980 that involved a contest between a black and white candidate, the black candidate lost every time. *Id.* at 115a (Stip. 153). Third, the *only* expert analysis of election statistics for Bossier Parish concluded that "African American voters are likely to have a realistic opportunity to elect candidates of their choice to the . . . Board only in districts in which they constitute a majority of the voting age population." J.A. 121. The elections in which Bossier now claims that

Dr. Engstrom did not find racial polarization using regression analysis and extreme-case analysis, B.P. Br. 3-4, are simply elections in which the underlying data are insufficient to permit a full application of these statistical techniques. J.A. 111-21. The partial analyses of these elections that Engstrom was able to perform, moreover, support the above-quoted conclusion of racially polarized voting. *Id.*

Moreover, the majority found that the area surrounding Barksdale Air Force Base in which a few black candidates for other offices in recent times have been successful in elections with white opponents is "unique." App. 2a n.1; App. 117a-18a (Stip. 162-63). All but two of the six elections cited by the Board in which a black candidate was successful against a white opponent involved this "unique" community. The other two involved an at-large election system in Haughton, and because these elections allowed for single-shot voting the election of black candidates shows nothing about racial polarization. App. 120a (Stip. 174). Moreover, while Bossier refers to only 14 black-white contests, 17 actually meet its arbitrary limiting criteria; the parties stipulated to facts concerning more than 20 such elections, *id.* at 115a-27a (Stip. 153-96); and the record includes undisputed results from more than 30. J.A. 55-60. In *all* of these other contests, black candidates lost to whites. *Id.*

Accordingly, Bossier is wrong to say that Board elections are not racially polarized, and the majority was wrong in refusing to consider that polarization in assessing the Board's motivation.

D. The School Board's Ongoing History of Discrimination Shows How and Why It Sought to Dilute Minority Voting Strength Through the Police Jury Plan

With respect to the Board's history of discrimination, the "facts" Bossier relies upon again simply cannot be

found in this record. While the Board now claims without support that unidentified "demographic factors" have caused increasing segregation in its schools, B.P. Br. 38-39 n.27, the evidence shows that the Board's own actions have contributed to it. Bossier itself submitted evidence showing that its transfer policy may have contributed to the growing racial imbalance in its schools. Pl. Exh. 14 at 4. The superintendent also admitted that the Board intentionally assigned a widely disproportionate number of minority teachers to predominantly black schools. J.A. 179. This is indisputably contrary to the Board's court-ordered obligations, App. 45a (Kessler, J., dissenting), and is a recognized method of unconstitutionally designating some schools as "black" schools and others as "white." *See Freeman v. Pitts*, 503 U.S. 467, 497 (1992). Finally, not only has the Board failed to achieve a unitary school system, but Board members admittedly were completely ignorant of their court-ordered desegregation obligations. *See, e.g.*, J.A. 74, 148.

In addition, while Bossier now blames its failure to maintain the court-mandated bi-racial committee on the waning "interest of volunteer citizens," B.P. Br. 38 n.27, there is no evidence to support this; instead, the record shows that for more than 20 years the Board reported to the federal court that the actually nonexistent bi-racial committee was "available." U.S. Exh. 84YY; J.A. 134. When the Board finally established a committee in 1993, Board members quickly terminated it for the same reason they adopted the Police Jury plan: they did not want blacks involved in "policy" questions. D-I Br. 9; App. 104a-06a (Stip. 114-17).

As noted, the majority below failed even to address the rest of the voluminous stipulated evidence of discrimination in Bossier Parish, and Bossier now seeks to defend this error by claiming incorrectly that this evidence "says nothing about *why* a black majority district was *not created*." B.P. Br. 35. Plainly it does. We do not

argue, however, as Bossier suggests, that evidence of non-Board discrimination in Bossier Parish is relevant because the Board is responsible for "private citizens' voting patterns" and all "historical discrimination," *id.* at 39. Rather, such evidence is probative because the Board's knowledge of the preferences of private citizens and the patterns of local history—like its awareness of racially polarized voting—made clear to the Board that the way to keep black voters out of "policy" questions was to adopt an election plan with all majority-white districts. App. 42a-46a (Kessler, J., dissenting). *See Rogers v. Lodge*, 458 U.S. 613, 618, 625 (1982).

E. The Board's Plan Fails to Satisfy Its Own Redistricting Criteria

To counter the foregoing showing of discriminatory purpose, Bossier now relies most heavily on the proposition that the Police Jury plan could not be discriminatory because it complies with the Board's traditional redistricting principles. *See* B.P. Br. 6-8, 40-41, 47-50. Not only is this assertion contradicted by the stipulated and unrebutted facts, but it also ignores the governing legal standard.

Bossier argues that this Court has accepted adherence to a "traditional redistricting principle *as a refutation of any discriminatory purpose finding*." B.P. Br. 47 (emphasis added). To the contrary, the Court carefully scrutinized legislative motives in *Miller*, *Shaw II* and *Bush v. Vera*, 116 S. Ct. 1941 (1996), and, in *Vera*, explicitly refused to accept adherence to a traditional redistricting criterion as a defense even to the allegation that race was *the predominant* factor in a decision, let alone *a contributing* factor, *id.* at 1951-52. While a showing that traditional redistricting principles were not subordinated to race may defeat the "analytically distinct" claim of racial gerrymandering, *Miller*, 115 S. Ct. at 2488, 2485, this Court has never suggested that a political body may intentionally dilute minority voting strength so long as its plan for doing so is

compact, contiguous or respects political subdivisions. Such a perverse rule would subordinate the Constitution to "traditional redistricting principles."

Of course, if the Board had *shown* that the reason it reversed course and adopted the Police Jury plan was to comply with traditional districting principles, this would be a different case. But here the record shows that Bossier's plan does *not* comply with its own criteria. Indeed, while the majority understandably made no finding at all on this subject, Judge Kessler found that the plan "plainly violates a whole number of redistricting principles." App. 51a.

For example, Bossier claims without support that the Police Jury plan "clearly complied with state law," B.P. Br. 40, but the undisputed evidence shows that the Police Jury plan violated state law in at least two respects: by including a district that is not contiguous and by exceeding the maximum allowable deviation from one person, one vote. App. 84a (Stip. 58); D-I Exh. G ¶¶ 31, 32.

The Board also claims without support that the Police Jury plan was compact. B.P. Br. 40. To the contrary, the stipulated facts demonstrate: (1) that the Board's cartographer, Gary Joiner, admitted that one-third of its districts were not compact, App. 111a-12a (Stip. 139); and (2) that one district "contained almost half of the geographic area of the Parish." App. 50a (Kessler, J., dissenting); App. 112a (Stip. 140).

Likewise, Joiner's own testimony defeats Bossier's claim that there is no showing that the Police Jury plan "'fragments' any concentration of minority voters." B.P. Br. 41. In fact, Joiner admitted that the plan appears to "fracture" the predominately black neighborhood surrounding two predominantly black elementary schools. App. 111a-13a (Stip. 137, 138, 142).

Bossier also claims without support that the Police Jury plan maintained the "integrity of municipal" boundaries "like all prior redistricting plans," B.P. Br. at 40, 2, but the record shows: (1) no information about any plan prior to 1980; (2) no indication that the Board ever considered municipal boundaries in redistricting; and (3) several stipulations that the Board was concerned instead about the location of schools in its districts, App. 72a-73a (Stip. 24), and the protection of incumbencies, App. 28a; App. 50a, and that the Police Jury plan violates these criteria. App. 112a (Stip. 141); App. 28a; App. 50a (Kessler, J., dissenting).

Finally, Bossier claims that its plan "respect[s] . . . the Police Jury districts," B.P. Br. 2, but the pertinent evidence in the record is the stipulated fact that "[t]hroughout the 1980s, the Police Jury and School Board maintained different electoral districts." App. 4a n.3.

F. The Board's Alleged Concerns About the Illustrative Plans Are Purely Pretextual and Underscore Its Actual Discriminatory Purpose

Just as the majority below found that "the School Board . . . offered several reasons for its adoption of the Police Jury plan that *clearly were not real reasons*," App. 27a n.15 (emphasis added), Bossier's current assertions questioning plans with majority-black districts are clearly pretextual.

The Board claims that the "black majority districts . . . were plainly not compact," B.P. Br. 40, but the record shows (1) stipulations that the Bossier City district was "an acceptable configuration from the standpoint of district shape," App. 115a (Stip. 150), and that it was "obvious that a reasonably compact black-majority district could be drawn within Bossier City," *id.* at 76a (Stip. 36), where "more than 50 percent of the black population of Bossier Parish is concentrated," *id.* at 68a (Stip. 10); and (2) an illustrative majority-black district

in the northern part of Bossier Parish that is no more irregularly shaped than any number of districts in the Board's 1980s plan and the current Police Jury plan. *See* J.A. 42-43, 45-46, 51-52.

Bossier also now claims that the NAACP plan "split every municipal boundary in the Parish," but the record contains a stipulation that "[o]verall, in the use of logical, traditional features . . . the NAACP Plan is not significantly different from the School Board plan." App. 113a (Stip. 144).

The Board claims as well that William Cooper drew the NAACP plan "for the exclusive purpose of 'creat[ing] two majority-black districts.'" B.P. Br. 2 (quoting J.A. 260). But the intent of the drawers of the various illustrative plans is irrelevant to the *Board's* intent in adopting the Police Jury plan. Moreover, the record shows that (1) the NAACP plan (which Cooper actually did not draw, App. 98a (Stip. 98)) was meant only as an illustration for the Board's information and was not intended to "create" any districts at all, *see* D-I Br. 16-17; and (2) as Cooper explained in the very testimony relied on by Bossier, his own subsequent illustrative plan was drawn to "assess whether or not it was possible to create two majority black districts *using traditional redistricting criteria*." J.A. 260 (emphasis added).

Bossier rests the bulk of its argument on the claim that the NAACP plan "facially violated" state law because it split precincts. B.P. Br. 43, 44. The record, however, shows that (1) no one suggested that the Board split precincts but that it consider working with the Police Jury to establish new ones, App. 156a-57a; J.A. 136-43; (2) the Board was well aware that it could work with the Police Jury to have precincts modified, App. 6a-7a, 29a; App. 99a-100a (Stip. 102); and (3) this procedure is commonplace in Louisiana, App. 72a (Stip. 22-23); J.A. 137-38.

The Board's elevation of precincts to the essential "building blocks" of Louisiana election districts is simply false. B.P. Br. 43. While Bossier claims that the precincts were "used by the Police Jury for its districts," *id.*, the record is clear that the Police Jury first drew its new election districts and *then* had to create a new system of precincts, with at least 13 new ones. App. 85a, 88a, 82a-88a (Stip. 60, 70, 52-68). The parties also stipulated that "Bossier Parish has made a number of . . . precinct realignments in the last ten years," *id.* at 77a (Stip. 38), and Bossier's own evidence confirms that the Police Jury changed precincts in 1987, 1989 and 1991, Pl. Exh. 1, and intended to consolidate precincts again in 1993. App. 85a-86a (Stip. 61).

While Bossier claims, with no record support, that it has a "longstanding, uniform practice of preserving Police Jury precincts," B.P. Br. 47, the state statute requiring the use of whole precincts by school boards did not even apply to any prior redistricting. J.A. 265-66. After the 1980 census, for example, Louisiana law provided that "school board election districts . . . *need not . . . have any relation* to, the . . . precincts that may be created by the police jury." *Id.* at 263 (emphasis added). Bossier also claims that it was "required to use [the] existing 1991 precincts," B.P. Br. 2, but, even under the new statute, the whole-precinct requirement did not apply where "the number of members of the school board is not equal to the number of" police jurors, J.A. 266, and a plan with five, seven or nine members, rather than 12, was one of the options that the Board originally considered but then abandoned without explanation. Tr. I at 44.

Most importantly, while Bossier now implies it was "powerless" to develop a plan that did not employ all of the Police Jury's precincts, B.P. Br. 43, the majority below found that the Board was "free to request precinct changes from the Police Jury," App. 7a, and it is undis-

puted that the Board knew it could "work with the Police Jury to alter the precinct lines." App. 95a (Stip. 89). It also is undisputed that through such cooperation the Police Jury could *reduce* its total precincts from 56 to 46 without changing its own election districts at all and still accommodate a School Board plan with two majority-black districts. D-I Exh. G ¶ 36. Nevertheless, the Board never even approached the Police Jury about modifying precincts. App. 7a. As a result, its alleged concern over precinct-splitting must be treated as pretextual, particularly in the face of the overwhelming evidence showing that the abrupt, belated adoption of the Police Jury plan was at least in part racially motivated.

CONCLUSION

When *all* the stipulated and unrebutted evidence is fairly considered under the governing standards, it is "far from being equally convincing on either side. Not only does the evidence fail to prove absence of discriminatory purpose, it shows that racial purpose fueled the School Board's decision." App. 38a-39a (Kessler, J., dissenting). This Court, therefore, should reverse.

Respectfully submitted,

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